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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 NATHEN BARTON,

12 Plaintiff,

13 v.

14 JOE DELFGAUW, *et al.*,

15 Defendants.

CASE NO. 3:21-cv-05610-JRC
AMENDED ORDER GRANTING
DEFENDANTS' MOTION

16 This matter is before the Court on the parties' consent. Pending before the Court is
17 plaintiff's motion for summary judgment (Dkt. 122) and defendants' "motion to continue or
18 strike motion for summary judgment." Dkt. 139.

19 **BACKGROUND**

20 Plaintiff, proceeding *pro se*, brought this action based on alleged violations of the
21 Telephone Consumer Protection Act and state law. *See* Dkt. 83. Defendants filed a counterclaim
22 alleging that plaintiff consented to be contacted using a different name so that he may bring a
23 federal lawsuit. *See* Dkt. 39 at 10–13. On March 14, 2022, plaintiff filed a motion for summary
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1 judgment in which he appears to be challenging defendants' ability to prove plaintiff consented
 2 to be contacted. Dkt. 122. On April 1, 2022, defendants filed a "motion to continue or strike
 3 motion for summary judgment," which appears to be a motion for relief under Federal Rule of
 4 Civil Procedure 56(d), because of outstanding discovery responses. *See* Dkt. 139 at 2. Plaintiff
 5 opposes the motion and argues that he responded to defendants' discovery requests on the same
 6 day defendants filed their motion. Dkt. 141 at 3–5. There are currently three discovery-related
 7 motions pending before the Court. *See* Dkts. 109, 136, 149. The deadline to complete discovery
 8 is set for June 22, 2022, and the dispositive motion deadline is set for July 22, 2022. Dkt. 124.

9 DISCUSSION

10 I. Legal Standard

11 Under Federal Rule of Civil Procedure 56(d), a nonmovant may avoid summary
 12 judgment "when they have not had sufficient time to develop affirmative evidence." *United*
13 States v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002). To do so, the party must
 14 set forth in an affidavit or declaration: (1) "specific facts it hopes to elicit from further
 15 discovery," (2) that "the facts sought exist," and (3) that "the sought-after facts are essential to
 16 oppose summary judgment." *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*,
 17 525 F.3d 822, 827 (9th Cir. 2008). "Failure to comply with these requirements is a proper ground
 18 for denying discovery and proceeding to summary judgment." *Id.* (internal quotation marks
 19 omitted). However, Rule 56(d) relief is generously granted where a summary judgment motion is
 20 filed "before a party has had any realistic opportunity to pursue discovery relating to its theory of
 21 the case." *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Rsrv.*,
 22 323 F.3d 767, 773–74 (9th Cir. 2003). Unless the nonmovant has failed to diligently pursue

1 discovery, such relief “should be granted ‘almost as a matter of course.’” *Id.* (quoting *Wichita*
 2 *Falls Office Ass’n v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992)).

3 Here, defendants appear to be diligently pursuing discovery. Defendants’ attorney
 4 submitted a declaration indicating that summary judgment “is not yet ripe as there are
 5 outstanding discovery responses from both sides.” Dkt. 140 at 2. Indeed, it appears that the
 6 parties are in the middle of exchanging discovery and there are currently three discovery-related
 7 motions pending before the Court. *See* Dkts. 109, 136, 149. Further, the deadline for discovery in
 8 this action is set for June 22, 2022, which is based on the parties’ joint status report from
 9 November 4, 2021. *See* Dkts. 37 at 5, 124 at 2. These circumstances call for Rule 56(d) relief.

10 In his opposition, plaintiff claims he responded to defendants’ discovery requests on
 11 March 30, 2022. *See* Dkt. 141 at 3. It is unclear if defendants received these responses before
 12 they filed their motion. However, even if they did, plaintiff provided those responses two weeks
 13 after he filed his motion for summary judgment and two days before defendants’ opposition brief
 14 was due. It is also not evident whether defendants were satisfied with plaintiff’s responses or
 15 whether they intended to meet and confer.

16 The Court notes that defendants’ motion does specify which facts they seek to oppose
 17 plaintiff’s motion for summary judgment. However, the Ninth Circuit has held that when a party
 18 is seeking discovery, they “cannot be expected to frame [their] motion with great specificity as to
 19 the kind of discovery likely to turn up useful information, as the ground for such specificity has
 20 not yet been laid.” *Burlington N.*, 323 F.3d at 774. At this point in the litigation, it is reasonable
 21 that defendants are seeking discovery regarding plaintiff’s consent to be contacted, which is at
 22 the core of plaintiff’s motion for summary judgment.

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1 Finally, although the Court is liberally construing defendants' motion this time, going
2 forward, defendants must cite proper authority for their motions. They did not do so here.

3 **CONCLUSION**

4 The Court grants defendants' motion, which is construed as a motion for Rule 56(d)
5 relief. Dkt. 139. Accordingly, the Court will strike plaintiff's motion for summary judgment and
6 the corresponding motions for judicial notice with leave to re-file after the close of discovery.
7 Dkts. 115, 117, 119, 121, 122. Defendants must also file any motions for summary judgment
8 after the close of discovery. This order supersedes the Court's previous order.

9 Dated this 12th day of April, 2022.

10 
11 J. Richard Creatura
12 Chief United States Magistrate Judge